COMMERCIAL UNION ASSURANCE (M) SDN BHD

v.

ASEAN SECURITY PAPER MILLS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: A-02-316 OF 1996]
26 FEBRUARY 1999

CIVIL PROCEDURE: *Want of prosecution - Striking out action for want of prosecution - Discretionary power of High Court under O. 34 r. 8(1) of Rules of the High Court 1980 - Circumstances under which action can be dismissed - Serious prejudice - Substantial risk of unfair trial - Inordinate and inexcusable delay not occasioning serious prejudice or substantial risk of unfair trial - Whether action should be dismissed*

The defendant ('the appellant') had filed an application to strike out the plaintiff's ('the respondent') suit for want of prosecution under O. 34 r. 8(1) of the Rules of the High Court 1980 ('the RHC'). This was the appellant's appeal against the refusal of the High Court to strike out the respondent's suit.

Held:
Per Haidar Mohd Noor JCA

[1] The power vested in the High Court under O. 34 r. 8(1) of the RHC is discretionary. The role of the Court of Appeal is initially one of review only.

[2] The learned judge was correct on the principles relating to the jurisdiction of the court in dismissing an action for want of prosecution. Following *Birkett v. James*, *Allen v. Sir McAlphine & Sons Ltd*, *Vasudevan v. T Damodaran & Anor* and *Toh Hock Thye & Ors v. Toh Chwee Biow*, the learned judge had set out the two circumstances under which an action can be dismissed for want of prosecution, ie, where the party has been guilty of intentional and contumelious default or of inordinate and inexcusable delay.

[3] The learned judge was also correct in holding that it was implausible that the witnesses could not be located or that they would not be able to recollect the particulars, and in making the finding that there was no evidence of prejudice to the appellant or of substantial risk that a

fair trial would not be possible. Thus, following *Marlton (An Infant) v. Lee-Leviten*, the learned judge was correct that if the appellant was not prejudiced by the delay, even if it was prolonged and inexcusable, the suit should not be dismissed.

[4] The learned judge had not committed any error of law or fact that warranted this court to interfere with the exercise of his discretion in dismissing the appellant's application.

[Appeal dismissed.]

Case(s) referred to:
Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543 ***(refd)***
Birkett v. James [1977] 2 All ER 801 ***(refd)***
Datuk Syed Kecik v. The Board of Trustees of the Sabah Foundation & Ors [1998] 3 CLJ 169 ***(refd)***
Marlton v. Lee-Leviten [1968] 1 WLR 1214 ***(foll)***
Toh Hock Thye & Ors v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***
Vasudevan v. T Damodaran & Anor [1981] 1 CLJ 84 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 236
Rules of the High Court 1980, O. 14, O. 20 r. 3, O. 34 r. 8(1)

For the appellant - Porres P Royan; M/s Shook Lin & Bok
For the respondent - Karpal Singh (CK Leong with him); M/s CK Leong & Co

[Appeal from High Court, Ipoh; Civil Suit No: 22-211-1990]

Reported by Farah Naim

JUDGMENT

Haidar Mohd Noor JCA:

The appellant (defendant in the court below) filed an application dated 5 December 1995 for an order that the respondent's suit (plaintiff in the court below) against the appellant be struck out for want of prosecution and that the costs of the application and the suit be taxed and paid by the respondent to the appellant. It is supported by the affidavit of one Yong Moh Peng, Manager, Underwriting and R/I (Non-Marine) of the appellant. It is opposed by the respondent through the affidavit of Lim Tian Huat, the court appointed liquidator of the respondent.

From the nature of the application, it would appear to have been made pursuant to O. 34 r. 8 of the Rules of the High Court 1980.

On 10 May 1996, the High Court at Ipoh dismissed the application with costs. The appeal was heard by this court on 4 May 1998 wherein we dismissed the appeal with costs. We now set out our reasons.

The respondent's claim is on a fire insurance policy issued by the appellant in respect of a fire which took place at the respondent's premises in 1989. The appellant repudiated liability under the policy on grounds of fraud and breach of policy conditions.

In order to appreciate the issue of want of prosecution we set out herein the chronology of events leading to the filing of the application by the appellant.

On 11 September 1990 the respondent filed a writ of summons with a statement of claim for a sum of RM16,124,500 being the 50% proportion of the sum insured. On 24 September 1990 the appellant filed memorandum of appearance. On 15 October 1990 the appellant filed its statement of defence. Thereafter, on 11 November 1990 the respondent filed an application for summary judgment under O. 14. Before the hearing of the O. 14 application, the respondent filed an amended statement of claim on 11 March 1991 pursuant to O. 20 r. 3 and as a result the appellant filed an amended statement of defence on 25 March 1991.

On 10 May 1991 the respondent's application for summary judgment was dismissed with costs by the senior assistant registrar. On 10 May 1991 itself the respondent filed notice of appeal to the judge in chambers.

The appeal was part heard by Dato Peh Swee Chin J (as he then was) on 12 August 1991 and was adjourned to 26 February 1992 for continued hearing. However, on 26 February 1992 a court circular was issued on behalf of Dato Abdul Aziz bin Mohamad J adjourning the matters to 17 June 1992. Apparently Dato Abdul Aziz bin Mohamad J took over charge of the High Courts at Ipoh.

On 17 June 1992, the parties appeared before Dato Abdul Aziz bin Mohamad J and requested for continued hearing of the appeal before Dato Peh Swee Chin J who had since been transferred. The respondent's counsel had undertaken to write and request for the approval of Dato Peh Swee Chin J to continue with the hearing of the appeal.

However, on 17 November 1992, the respondent's counsel informed the court that Dato Peh Swee Chin J ordered the appeal be heard *de novo.* The respondent's counsel requested for an early date of hearing of the appeal *vide* letter dated 17 November 1992, with a copy to the appellant's counsel (see p. 137 of the Appeal Record). Counsel for the respondent did not pursue further for a date and neither did the court fix a date for the hearing of the appeal *de novo*.

In the meantime, the respondent unfortunately was ordered to be wound up pursuant to a court order in Kuala Lumpur *vide* Companies Winding-Up No. D6-28-200-1992. The date when the order was made, however, was not disclosed. Lim Tian Huat of Messrs Arthur Andersen & Co. of Kuala Lumpur was appointed liquidator of the respondent by the court.

No further steps were taken to further prosecute the appeal. However, by letter dated 21 November 1995 counsel for the respondent intimated to counsel for the appellant of instructions to discontinue the appeal (see p. 141 of the Appeal Record). On 22 November 1995 summons for directions was filed by the respondent. This was done as a result of the query by counsel for the appellant *vide* letter dated 18 November 1995 to the respondent's counsel (see p. 140 of the Appeal Record). At the same time counsel for the appellant questioned the authority of counsel to act for the respondent in view of the winding up order and the appointment of the liquidator. The issue of authority was quite correctly taken by counsel for the appellant in view of the powers of the liquidator as set out in s. 236 of the Companies Act 1965. Counsel for the respondent wrote to counsel for the appellant *vide* letter, dated 21 November 1995 (see p. 141 of the Appeal Record) enclosing a copy of a letter from the liquidator dated 6 November 1995 which is self-explanatory. It was in response to the letter dated 18 November 1995 from the appellant's counsel to the respondent's counsel requesting for confirmation to act in the matter by the liquidator of the respondent (see p. 140 of the Appeal Record).

It would be appropriate then to reproduce the letter dated 6 November 1995 from the liquidator which was said to be self-explanatory by counsel for the respondent. The said letter (at p. 142 of the Appeal Record) reads:

ARTHUR ANDERSEN

BY FAX (05-2535507) AND MAIL

6 November, 1995

Messrs C.K. Leong & Co.
Advocates & Solicitors
85 Jalan Sultan Abdul Jalil (Jalan Clarke)
30300 Ipoh

Attention: Mr. C.K. Leong

Arthur Andersen & Co.
Public Accountants

Level 1 – Block C (South)
Pusat Bandar Damansara, 50490
Kuala Lumpur
PO Box 11040, 50734 Kuala Lumpur,
Malaysia

Tel: 03-255 7000

Fax: 03-255 5332 (Main)
03-255 9076, 03-255 9078 (Audit)
03-254 3948 (CRS)

Dear Sirs

ASEAN SECURITY PAPER MILLS SDN. BHD. – IN LIQUIDATION ("ASPM") INSURANCE CLAIM AGAINST COMMERCIAL UNION ASSURANCE BERHAD AND TENAGA INSURANCE BERHAD BY ASPM

I refer to my letter dated 17 October, 1995 and the subsequent telephone conversation between yourself and Mr. Aaron Loh of my office on 30 October, 1995 regarding the above matter.

As discussed, it was confirmed that you have received my letter dated 17 October, 1995 and you are proceeding to set the above actions down for trial. I would appreciate if you could furnish a copy of all documents filed into court with regards to the above matter as well as any correspondence with the defendants and/or their solicitors and keep me advised on any developments.

Please contact the undersigned or Mr. Aaron Loh of my office if you have any immediate queries.

Yours faithfully

sgd.

Edwin Chew
For Lim Tian Huat
Liquidator
Asean Security Paper Mills Sdn. Bhd.
- In Liquidation

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Copies to: Ms Ng Sai Yeang
Messrs Raja Darryl & Loh (Fax No. 2984759)

Mr. Tay Beng Wah
Pernas Trading Sdn. Bhd. (Fax No. 4083750)

Before the summons for directions could be heard, the appellant filed an application on 5 December 1995 to strike out the respondent's suit for want of prosecution (see p. 104 of the Appeal Record).

It is not disputed that the power vested in the High Court under O. 34 r. 8(1) is a discretionary one. It is equally not disputed that the role of this court initially is one of review only in respect of an appeal of this nature. This court in *Datuk Syed Kecik v. The Board of Trustees of the Sabah Foundation & 2 Others* [1998] 2 MLJ 137 at p. 148 stated:

> It has been repeatedly said that this court has no original discretion in an appeal of this nature. Its initial function on appeal is one of review only. It is only after an appellant demonstrates either a serious misdirection by the judge or that the judge has taken into account something that he should not, or that he has failed to take into account something he should have had regard to, or that his order amounts to a miscarriage or failure of justice, that this court would be entitled to intervene and exercise a discretion of its own.

The learned judge, in our view, correctly applied his mind on the legal principles relating to the jurisdiction of the court to dismiss an action for want of prosecution. Following *Birkett v. James* [1977] 2 All ER 801, which quoted with approval *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543, CA, the learned judge set out the two circumstances in which an action may be dismissed for want of prosecution:

(1) when the party has been guilty of intentional and contumelious default, or

(2) where there has been inordinate and inexcusable delay in the prosecution of the action -

(a) give rise to a substantial risk that a fair trial would not be possible; or

(b) such as is likely to cause or to have caused serious prejudice to the defendant.

Our Federal Court has accepted and applied the principle laid down in *Allen's* case in *Vasudevan v. T Damodaran and Anor* [1981] 1 CLJ 84; [1981] 2 MLJ 150 and *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152.

According to the learned judge, the appellant's complaint revolved on the second limb, that is, inordinate and inexcusable delay in the prosecution of the suit. He then went on to hold that even if there was a delay and in this case it was at most about three years (from 17 November 1992 to 22 November 1995), such delay was not inexcusable. He relied on two grounds, namely:

(a) the transfer of Peh Swee Chin J which led to the delay in the hearing of the appeal, that is, whether the said judge should continue with the part heard appeal or it be heard *de novo*; and

(b) the intervening winding up of the respondent led to the delay in the prosecution of the appeal/suit which is beyond the control of counsel for the respondent or the respondent. This is so as the counsel would need the authority of the liquidator of the respondent to further act in the suit.

The learned judge then proceeded to consider that even if there was a delay, whether the delay gave rise to a substantial risk that a fair trial would not be possible or the delay was such as likely to cause or to have caused serious prejudice to the appellant. The appellant's counsel contended that since the appellant had raised the issue of fraud, the appellant would have to rely on witnesses' account as to the date and manner of the alleged fire. Further, owing to the delay there would be difficulty in locating witnesses and even if located, their testimonies would be infirmed by effluxion of time. Counsel for the appellant contended also that certain key witnesses had since left the company. There were also certain documents which were false and the makers of the documents would have to be produced.

In answer to the contention of the appellant's counsel, the learned judge referred to the ongoing criminal trial against the owner of the respondent in the Sessions Court *vide* Criminal Trial 62-4-90. The witnesses that the appellant alleged to have gone missing were in fact witnesses for the prosecution in the said trial. The learned judge, in our view, rightly held that it was implausible that the witnesses could not be located or that they would not be able to recollect the particulars and made a finding that there was no evidence of prejudice to the appellant or a substantial risk that a fair trial is not possible. We see nothing wrong with such a finding.

The learned judge, in our view, rightly held following *Marlton (An Infant) v. Lee-Leviten* [1968] 1 WLR 1214 that if the appellant was not prejudiced by the delay, even if it has been prolonged and inexcusable, the suit should not be dismissed.

Given the circumstances of this case, and that the learned judge had carefully considered all the facts and correctly applied the law, we are of the opinion that he had not committed any error of law or facts that would warrant us to interfere with the exercise of his discretion in dismissing the application of the appellant.

The appeal was dismissed with costs. Deposit to the respondent to account of taxed costs.